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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

CRIMINAL APPEAL NO.66/2002

APPELLANT (In Jail) — Purushottam Mahanand, aged about 22 years, S/o Shri Sudu Mahanand R/o Bleow Railway Line Saraswati Nagar, PS Amanaka RAIPUR, CHHATTISGARH

Vs

RESPONDENT — The State of Chhattisgarh

Present:
Mr. Sachin Singh Rajput, Advocate for the appellant.
Mr. Arun Sao, Govt. Adv. for the respondent-State.

ORAL JUDGMENT
(13th September, 2007)

Per Dhirendra Mishra, J:

This appeal under Section 374 (2) of Cr.P.C. is directed against the judgment of conviction and order of sentence dated 27th December, 2001 passed in Sessions Trial No.405/01 whereby learned 2nd Additional Sessions Judge, Raipur has convicted the appellant under Sections 363,366 & 376 of the IPC and sentenced him to undergo R.I. for 3 years and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for 6 months; R.I. for 5 years and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for 6 months & R.I. for 10 years and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo R.I.

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..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

for 1 year respectively. All the sentences have been directed to run concurrently.

The case of the prosecution, in brief, is that on 15.8.2001 at about 8.00 p.m. the prosecutrix had gone to do the domestic work to the house of one Smt. Sangeeta Tikariya (PW-2) and when she did not return to the house till 7.00 p.m., Ramhebai, mother of the prosecutrix, gave missing report in the Police Station Amanaka. However, the prosecutrix returned at about 10 p.m. in the night and on enquiry by Ramhebai, the prosecutrix narrated the incident that the appellant enticed her, took her to his brother's house and committed rape with her. Thereupon, a report was lodged on 19.8.2001 at about 2.00 p.m. vide Ex.P-3 and on the basis of above report crime was registered under Sections 363, 366 & 376 of the IPC and FIR of Ex.P-6 was recorded on the same day. The prosecutrix was sent for medical examination where Dr. Preeti Agarwal (PW-10) examined her and gave her report of Ex.P-11A. Subsequently, the prosecutrix was again examined by Dr. Nidhi Gupta (PW-11) and her report is Ex.P-12. The prosecutrix was sent for ossification test to the Radiology Department of Medical College, Raipur and the report of the Radiologist is Ex.P-1.

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Raipur and after committal the same was received on transfer for trial by learned 2nd Additional Sessions Judge. During trial, the prosecution examined 12 witnesses, thereafter the statement of accused was recorded under Section 313 of Cr.P.C. in which he denied the allegations and stated that he has been falsely implicated in the crime. Learned Additional Sessions Judge after hearing learned counsel for respective parties convicted and sentenced the appellant as mentioned herein above.

Learned counsel for the appellant submits that from perusal of the statement of the prosecutrix (PW-3) it is evident that she accompanied the accused to his brother's residence on a bicycle to a distance of 4-5 kilometers but she did not raise alarm on the way or even did not try to run away, as she was sitting in the carrier of the bicycle, which is suggestive of the fact that she was the consenting party. As per the case of the prosecution, the prosecutrix had returned to her home on the following day at 10.0 p.m., however, the report was lodged only on 19.8.2001 and there is no explanation for the delay in lodging this report, which establishes the defence of the appellant that report was lodged after due deliberation. It is also submitted that in medico-legal report of the prosecutrix no injury was

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

found on the person of the prosecutrix and the doctors have not given any definite opinion about the commission of offence. However, the doctor has stated that the prosecutrix was habitual to sexual intercourse. Since the prosecutrix accompanied the accused on her own free will on the carrier of his bicycle, the ingredients of Section 363 are not made out. He further submits that though there is allegation of rape but looking to the conduct of the prosecutrix and report of the doctors the uncorroborated testimony of the prosecutrix cannot be acted upon. Lastly, it was argued that the trial court has sentenced the appellant under Section 376 (f) though it appears that the conviction is in fact under Section 376 (2) (f), however, there is no evidence available on record that the age of the prosecutrix was below 12 years at the time of incident and therefore, conviction of the appellant under Section 376 (2) (f) cannot be sustained.

On the other hand, learned Government Advocate for the State supported the impugned judgment and submits that from the statement of S.B. Netam (PW-1), Assistant Professor, Department of Radiology, Medical College, Raipur, who have assessed the age of the prosecutrix between 9-14 years, it is established that the prosecutrix was less than 18/16 years of age at the time of incident. The doctor

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

has categorically stated that no margin was possible with respect to the age of the prosecutrix which he has assessed to 9-14 years. He further submits that the prosecutrix has categorically stated that she was enticed and compelled by the accused to accompany him to his brother's house, thereafter she was kept in confinement for the whole night and was released only on the following day at about 10.00 p.m. and thus the accused kidnapped the minor prosecutrix from the lawful guardianship with a purpose to commit illicit intercourse with her and thereafter he raped her against her wishes. However, he fairly concedes that looking to the report of Radiologist the age of the prosecutrix was between 9-14 years, therefore, the appellant ought to have been convicted under Section 376(1) of the IPC in place of Section 376 (2)(f) of the IPC.

I have heard learned counsel for the parties. I have perused the evidence available on record as also the impugned judgment.

The trial court has based the conviction on the statement of the prosecutrix. Even if the arguments of learned counsel for the appellant is accepted and from the conduct of prosecutrix it may be held that she was the consenting party in that case also looking to the age of the prosecutrix, which has been assessed at 9-14 years by the Radiologist, the consent is of no consequence, as the prosecutrix was

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..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित — 6 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

below 18 years of age and even below 16 years of age at the time of incident. Statement of the prosecutrix is duly corroborated by the statement of PW-4 Ramhebai as also PW-7 Jamuna Bai.

So far as the arguments of learned counsel for the appellant regarding unexplained delay in lodging the FIR is concerned, the evidence is available on record that the missing report was lodged by the complainant in the following morning and only thereafter the prosecutrix returned home and therefore, the delay in lodging the report is immaterial.

As far as the arguments of learned counsel for the appellant that as per medical report no injury was found on the person of the prosecutrix is concerned, this Court has already held that the prosecutrix was a minor aged between 9-14 years, therefore, the conviction of the appellant cannot be quashed on the ground of absence of injury over her person.

Therefore, in the considered opinion of this Court, the conviction of the appellant under Sections 363 & 366 is in accordance with law and the same does not call for interference. However, taking into consideration the age, as assessed by the Radiologist vide document of Ex.P-1 that her age was between 9-14 years at the time of incident, the ends of justice would be served if the conviction of

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the appellant under Section 376 (2)(f) of the IPC is altered to Section 376 (1) of the IPC and he is sentenced to undergo R.I. for 7 years in place of R.I. for 10 years.

In the result, the appeal partly succeeds and while maintaining the conviction & sentence of the appellant under Sections 363 & 366 of IPC, his conviction under Section 376 (2) (f) of the IPC is hereby set aside and instead thereof he is convicted under Section 376 (1) and sentenced to undergo R.I. for 7 years and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for 3 months.

Sd/-
DHIRENDRA MISHRA
Judge

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